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IN THE

SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1979

No. 78-1681

MARY M. LIGGETT, Petitioner

v.

SECRETARY OF HEALTH, EDUCATION,
AND WELFARE, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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May 13, 1980

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The petitioner MARY LIGGETT respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 15, 1980.

...

...

OPINION BELOW

The Opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 4, 1980. A timely petition for rehearing was denied on February 15, 1980 and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

1. If 42 U.S.C. Section 416 (C)(k)(1) describes as disability as inability to engage in any substantial gainful activity, must claimant demonstrate total inability?

2. Whether granting disability for one year and finding the end of

disability without notice of hearing or any hearing violates due process.

STATUTORY PROVISIONS INVOLVED

42 U.S.C. Section 416 (C)(i)(1)

Except for purposes of Sections 402 (d), 402 (e), 423 and 425 of this title, the term 'disability' means (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result or has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. Section 423 (d)(2)(A)

(2) an individual ... shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering

his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), "work which exists in the national economy" means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

STATEMENT OF THE CASE

Petitioner filed for disability benefits on September 11, 1974, alleging she became disabled on May 17, 1974 as a result of a sciatic nerve operation preventing her from sitting or standing

any length of time. She is a high school graduate and had worked at various assembler and clerical jobs in the past, the last position being a payroll clerk at a lumber company from September, 1971 to May, 1974. The Secretary found that she was entitled to disability benefits from May 17, 1974 to May 28, 1975, but not thereafter, upon a showing of improvement of her condition.

On March 2, 1975, plaintiff was hospitalized for further complaints after a previous hospital stay for a sciatic notch operation. Claimant continued to see physicians for this condition after her discharge, and in June, 1975, her physician concluded she was unable to follow any gainful occupation. Both that physician, Dr. Bushard, and another, Dr. Lewter, considered claimant permanently disabled and unable to work

at her usual occupation for an indefinite period of time.

In November, 1975, claimant testified before Administrative Law Judge Bernstein at a hearing. The Judge felt that the doctor's reports finding her still disabled were insufficient for medical findings.

The decision of the Administrative Judge denying disability payments after May 28, 1975 became the final decision of the Secretary, when the Appeals Council, after receipt of additional medical reports, found on May 27, 1976 that it warranted no change.

REASONS FOR GRANTING THE WRIT

1. Disability under the statute in question is described as inability to engage in substantial gainful activity. This can be shown by the existence of a mental or physical

impairment preventing a return to one's past occupation due to the medically determinable impairment.

The plaintiff must show inability to return to the former occupation. The Secretary must then come forward to show some other work exists which a person with the claimant's particular background and condition can perform. The ultimate burden rests on the claimant to show the disability precludes any substantial gainful employment.

The plaintiff herein was considered totally disabled from May 17, 1974 to May 28, 1975, based on medical reports provided. After May, 1975, she continued under the care of several physicians who found her disabled in that she had a tendency towards tendonitis and/or neuralgic pain. One doctor stated her condition was such that he did not

believe she could follow any gainful occupation. The same condition for which she received total disability payments persisted, yet the Administrative Law Judge terminated benefits.

Subsequent medical reports were discounted by the Judge. He believed the reports were insufficient for medical findings, yet no medical testimony was heard to establish the continuing disability.

There is no evidence in the record that claimant recovered from the disability.

2. Termination of benefits without prior evidentiary hearing has been held unconstitutional in that due process is denied. The opportunity to be heard requires that a recipient of benefits have adequate notice detailing the reasons, and an opportunity to defend

and present arguments.

The claimant submitted medical reports showing she was disabled after May, 1975. Although no disability was found by the Judge, the Secretary presented no evidence to the contrary. Claimant cannot rebut evidence if none is presented.

The reports relied on by claimant upon which disability was found are the same reports which the Judge deemed to show no disability.

In the case of Richardson v. Wright, 92 S.Ct. 788 (1972), this Court noted that new regulations implemented in 1971 by the Social Security administration required that a recipient of benefits be given notice of a proposed suspension and the reasons therefor, plus an opportunity to submit rebuttal evidence. Unless the Secretary presents evidence to show the nonexistence of disability

claimant is left in a vacuum, neither able to defend nor rebut.

Plaintiff met her burden to show her disability precluded any substantial gainful employment, but the Secretary has not overcome that burden. The Secretary has not met his burden at all.

The correctness of the decision of the Administrative Judge below, even assuming that the statutory test has been employed, is open to serious question. The records submitted show quite clearly that the claimant met her burden and that her medical records cannot support a finding of total disability for one year, and simultaneously support a termination of benefits based on the same records.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

May 12, 1980

IRWIN L. SCHROEDER,
Counsel for MARY M. LIGGETT

FILED

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY M. LIGGETT,

Plaintiff-Appellant,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant-Appellee.

No. 78-1681

MEMORANDUM

Appeal from the United States District Court for the Southern District of California

Before: BROWNING, CHAMBERS and CARTER*, Circuit Judges.

This is an appeal from the order of the district court dismissing appellant's action, which she brought under 42 U.S.C. §405(g), to review and to set aside the Secretary's decision that she was no longer entitled to disability insurance benefits.

The district court granted summary judgment in favor of the Secretary, holding that there was substantial evidence to support the findings of the Secretary that appellant was not entitled to further benefits. This Court, like the district court, is obligated to accept the Secretary's findings if they are supported by substantial evidence. 42 U.S.C. §405(g); Chavies v. Finch, 443 F.2d 356 (9th Cir. 1971); Rhinehart v. Finch, 438 F.2d 920 (9th Cir. 1971). There is substantial evidence in this case and we therefore affirm the judgment of the district court.

"Disability" as the word is used in the Social Security statute, is defined in 42 U.S.C. §423(d)(1)(A) as:

". . . inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months . . . ."

Section 423(d)(2) expands on the definition:

"(A) an individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy, regardless of whether * * * a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country."

Exploratory surgery was performed in 1974 disclosing some abnormality in appellant's sciatic nerve. Steps were taken to treat her condition with rest and medication. She was granted disability insurance benefits for one year, but when they terminated, in July 1975, she claimed that the disability had not terminated and that she was entitled to continuing benefits.

The evidence produced by appellant included a letter from an orthopedic surgeon who stated that he could not account for her symptoms and that she had rejected his suggestions that she undergo further tests. Another physician stated that he was convinced that there was a limitation of her activities due to pain and that he had advised her to "curtail her activities in order to reduce the amount of narcotics required for the control of the pain." Neither physician offered any objective explanation for the complaints of debilitating pain. There was also evidence that during the time in question, appellant had applied for unemployment insurance, implicitly certifying that she was capable of performing at least some employment duties.

*The Honorable James M. Carter, United States Circuit Judge, died on November 18, 1979. This memorandum had not been reviewed by Judge Carter prior to his death

The Administrative Law Judge found that she had not carried her burden of proof in establishing disability past May 1975, but that, on the contrary, she was, after that date, capable of performing work of a sedentary clerical nature. He correctly stated that it was not sufficient that appellant merely establish the existence of pain and discomfort, but that her burden was to establish that her disability was "total." His findings were reviewed and upheld by the Appeals Council of the Department of Health, Education and Welfare.

The district court thereafter also reviewed the record in the light of existing legal standards and after a careful and thorough review concluded that there was substantial evidence to support the Secretary's findings. On the basis of that same record, now offered to us for our review, we come to the same conclusion.

Affirmed.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARY M. LIGGETT,

Plaintiff-Appellant,

vs.

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Defendant-Appellee.

No. 78-1681

ORDER DENYING

PETITION FOR REHEARING

Before: BROWNING and CHAMBERS, Circuit Judges.

The petition for rehearing is denied.